

1 benefits that the Commission is trying to achieve.

2 MR. BAYNES: And I agree with Al. And I  
3 think the thing that we have to make -- that  
4 they're concerned about is that it's not just any  
5 minority, or any woman, that we have to look to  
6 make sure that they meet whatever standards, and  
7 that they're actually going to provide the kind of  
8 diversity that you're looking for.

9 And so, as a result, that's the reason  
10 why you'd probably have to have some intermediate  
11 step before you actually put them out to auction.  
12 Put - (inaudible).

13 MR. LEWIS: Well, that raises an  
14 interesting question, "the diversity that we're  
15 looking for." Because while the Commission has  
16 for many years thought that minority-ownership  
17 policies would promote diversity, it's not been as  
18 effective in defining what the diversity it's  
19 talking about -- what diversity it's talking  
20 about.

21 In particular, I'd like the panelists to  
22 address about whether we're talking about

1 diversity in programming alone, or other kinds of  
2 diversity? And whether the diversity we're  
3 looking for is a means to an end or an end in  
4 itself?

5 MR. HAMMOND: Well, I guess I've always  
6 understood "diversity" to really be focused on, in  
7 significant measure, what the broadcaster is  
8 supposed to be providing, which is service to the  
9 public.

10 We live in a very diverse society. So  
11 the idea would be, in part, that that broadcaster  
12 is going to do what we used to do -- and speaking  
13 as a former broadcast, I was at WJLA here in  
14 Washington, D.C., for a number of years and had to  
15 oversee the ascertainment process. So I know both  
16 the pluses and the minuses.

17 But one of the things we were required  
18 to do was actually meet with the public and find  
19 out what the public wanted, and what the public  
20 was concerned about, and what the public needed.  
21 I think that it was a mistake to remove that as a  
22 criterion, to assume that the marketplace would

1 take care of that.

2 So in addressing the issue of diversity,  
3 if you live in a diverse society and a diverse  
4 community, it would seem perfectly normal and  
5 logical that you would be determining what that  
6 community's concerns were.

7 And I guess I'd answer the question that  
8 way.

9 MR. LEWIS: Dr. Byerly?

10 MS. BYERLY:: : I guess I want to go  
11 back to some of the points that I made about the  
12 true need for the Commission to go back to some  
13 kind of stated criteria for "public interest."  
14 They have been missing for a couple of decades.

15 And I think all broadcasters, regardless  
16 of who they are, or all owners, would come --  
17 would be able to better figure out whether they're  
18 serving the public's interest if there were a  
19 stated set of criteria.

20 But I think it's a correct assumption on  
21 the part of the Courts and the Commission and  
22 others to assume that there is a relationship

1 between people coming from a particular community,  
2 and being able to better serve that community.

3 So I would agree with Professor Baynes  
4 that any woman or any minority wouldn't  
5 necessarily be able to meet the needs of the  
6 community they biologically represent. We hope  
7 that they also have some other, bring some other  
8 evidence that they represent the needs and  
9 interests and concerns of that community at the  
10 time that they apply for their stations, and be  
11 able to show that.

12 MR. LEWIS: How do you think -- what  
13 kind of showing do you think, that you contemplate  
14 they would make. Is it a programming commitment,  
15 or is it a --

16 MS. BYERLY:: : Yes-

17 MR. LEWIS: -- a look backwards at their  
18 history?

19 MS. BYERLY:: : I think the educational  
20 programming, the public interest, the public  
21 affairs programming -- what do they intend to do?  
22 I mean, what sorts of things do they see need to

1 be covered?

2 And, again, if -- you know, one of the  
3 other studies that I've suggested is that we need  
4 to go out really ask people in communities what  
5 they need. When we asked people in the  
6 Washington, D.C., communities, we were rather  
7 interested to see that they wanted to know how to  
8 get involved in their communities. You know, they  
9 knew -- for instance, in one community that had a  
10 high crime rate, they said, "We know that there  
11 are groups out there working on this, but we don't  
12 have any idea who they are or how to get in touch  
13 with them."

14 I mean, so the day of PSAs has sort of  
15 gone away. And all they get is music and, you  
16 know, other entertainment. Maybe talk shows. But  
17 they don't necessary provide that kind of  
18 information.

19 So I think we have to get some of our  
20 indicators and criteria about what is the public  
21 interest and what do they need from the public  
22 themselves. That means getting out -- you know,

1 getting out and asking people.

2 MR. LEWIS: Professor Reed-Huff?

3 MS. REED-HUFF: I would agree with what  
4 Professor Byerly just said about asking the people  
5 what they need, what they want, what the  
6 communities want. I think it's very easy for us  
7 to sit here as academics and government officials,  
8 kind of in our ivory tower, without actually  
9 getting out to the people to figure out what it is  
10 they need.

11 But on the other point, as well,  
12 analogizing this to law schools -- from a law  
13 school, if we were to look at local media markets  
14 as a potential law school class, or law school  
15 population, in admissions in law schools, we don't  
16 particularly look for everyone to be the same.  
17 We're not necessarily looking for homogenous. We  
18 certainly would not like a homogenous student  
19 body.

20 But in diversity, we're looking for  
21 people to bring a variety of different  
22 perspectives to the table. So not everyone from

1 the same high school, not everyone from the same  
2 undergraduate institution.

3 So, to the extent that we could look at  
4 media markets as a potential law school class to  
5 draw the analogy, we're looking for people coming  
6 from a variety of different places, with a lot of  
7 different perspectives to enhance the voices in  
8 the marketplace, and hopefully enhance our  
9 democracy.

10 So I would say that programming  
11 commitments, such as public interest and  
12 educational commitments might not be unwarranted.  
13 I mean we put, we do put certain educational  
14 obligations on television broadcasters. I don't  
15 see why it could not be imposed similarly on radio  
16 broadcasters.

17 MR. LEWIS: Anybody -- Professor  
18 Campbell?

19 MS. CAMPBELL: I just -- you sort of  
20 posed the question as "what do we mean by  
21 'diversity'?" Is it program content, or is it  
22 process?

1           And I think it's both. And I think part  
2 of the problem here is that the FCC has used that  
3 word in so many ways over the years that it is  
4 hard to put your finger on. And maybe we need a  
5 different word.

6           But, I mean, I think that this is sort  
7 of the problem, that if you have a greater  
8 diversity in terms of decision-makers about what  
9 goes on the air, then you are going to end up with  
10 a different diversity of programming. But it's  
11 hard to analyze, because you'd be doing content  
12 studies. I mean, people do them, and they do show  
13 that there is diversity, but it is very hard to  
14 really build a whole lot of data.

15           But I think that it really, it's not one  
16 or the other, it's really both.

17           MR. LEWIS: Anybody else? Any further  
18 thoughts?

19           MR. BAYNES: Well, I think that the  
20 individualized consideration analysis, in terms of  
21 narrow tailoring sort of focuses mostly on sort of  
22 diversity rationale as opposed to the



1 discrimination rationale.

2 So under the discrimination rationale, I  
3 don't know if you would necessarily need to do  
4 specifically -- it's remedial. So you're trying  
5 to fix the problem.

6 You know, the problem with diversity is  
7 that it's so amorphous, what does that mean? And  
8 that's why, you know, the courts say you have to  
9 have this individualized determination.

10 But for a discrimination rationale it's  
11 a remedy, and so it's sort of more of a blunt --  
12 it's a blunter, somewhat blunter instrument. You  
13 still have to have the narrow tailoring that it  
14 has to be, you know, a short time period. And as  
15 you look at sort of problems that it might affect  
16 on sort of non-minorities, and that you considered  
17 race-neutral measures. But I don't know if you  
18 would necessarily have to be do individualized  
19 determination for the discrimination rationale.

20 MR. LEWIS: Well, that's a very good  
21 point. Professor Baynes, you had mentioned, I  
22 think, in your presentation the Commission's -- I

1 forget -- "passive complicity" or --

2 MR. BAYNES: Complicity, uh-huh.

3 MR. LEWIS: -- in past discrimination.

4 I'd like to get the other panelists' reaction  
5 about -- and yours, as well -- about whether we  
6 have sufficient evidence, or whether we can gather  
7 sufficient evidence to have that strong evidence  
8 in the record that the courts seem to require for  
9 a past-discrimination rationale.

10 I take it that even with the cutback by  
11 the courts that they are still settled that you  
12 can employ race-conscious measures to remedy past  
13 discrimination. The problem comes in proving that  
14 past discrimination.

15 So I guess it's again a two-part  
16 question. One is, do you think that if we could  
17 show the FCC's passive complicity, that that would  
18 be enough for a strong basis in evidence? And/or  
19 what kind of further evidence would we need to  
20 show to employ remedying-past-discrimination as  
21 our rationale for measures?

22 MR. HAMMOND: Well, I guess one of the

1 things that comes to mind almost immediately is  
2 the WLBT situation, in which the Commission had  
3 evidence that the community was not being -- the  
4 total community was not being served; that, in  
5 fact portions of the community were being  
6 purposefully excluded, and that there was a  
7 concern about that. And the Commission took quite  
8 a while, and it took really the forcing by the  
9 D.C. Circuit for the Commission to finally  
10 acknowledge the discrimination that was going on  
11 and to actually do something about it -- that its  
12 prior policy with regard to station renewals had  
13 been to just renew the station and say, "Well, do  
14 something about it," but not really actually  
15 follow through to make sure that something  
16 actually had been done.

17 One question would be, to the extent  
18 that the Commission engaged in those types of  
19 hearings on renewal in the past -- I mean, how  
20 many of those situations were there? How many  
21 times did that happen? How many complaints did  
22 the Commission receive that were not acted on?

1     Though that's going to be difficult, because I  
2     don't know what kind of data the Commission  
3     actually has on that from those time periods. But  
4     that would be one thing to look at.

5             There certainly have been decisions by  
6     the Commission to facilitate, let's say, ownership  
7     policies in terms of multiple ownership, either  
8     within markets or nationally that have had, or  
9     could have had, adverse impacts on minorities.

10            And so in that sense, the Commission, by  
11    virtue of not considering, in many instances, the  
12    impact of its policies on minority efforts to  
13    acquire stations, or on female efforts to acquire  
14    stations, could be said to be complicit in that  
15    sense.

16            MR. BAYNES: The way the courts look at  
17    this is, at least in the construction area, is  
18    that it is the -- the passive complicity is the  
19    government is infusing tax dollars into industries  
20    that are discriminating against the people who are  
21    getting these licenses, or these rights to use,  
22    you know -- to get these contracts.

1           And so -- take Adarand for itself,  
2     Adarand, you know, the Court came up with this  
3     test of strict scrutiny. But on remand, the  
4     discrimination, the first prong was easily met. I  
5     mean, the Justice Department actually did this  
6     full review after Adarand to sort of highlight  
7     sort of all the discrimination that had taken  
8     place, especially in capital markets. And I think  
9     that's very well known that most minority- and  
10    women-owned businesses sort of face that.

11           And really, the discussion was all on  
12    the second part of the test, over whether it was  
13    narrowly tailored, on remand.

14           And so I think one of the things is  
15    that, you know, the FCC probably needs to review  
16    the studies that were done in the late '90s to see  
17    whether they are still relevant -- I think some of  
18    them are -- and whether there's any additional  
19    ones that need to be done. For instance, there  
20    weren't any really done with respect to women  
21    owners with respect to sort of the discrimination  
22    -- some of the discrimination they face.

1           And then sort of figure out will this be  
2           enough of a record, and bolster it with other  
3           evidence in other industries that show that the  
4           discrimination still -- that a lot of businesses  
5           actually face, especially the capital market  
6           discrimination. And then sort of, then the next  
7           step is, you know, crafting rules that are  
8           narrowly tailored that address that aspect of the  
9           discrimination -- you know, the discrimination  
10          that you're seen, or that you've identified.

11           MR. LEWIS: Professor Campbell?

12           MS. CAMPBELL: This is a tough question,  
13           for a couple of reasons -- one is that most of the  
14           cases that we've looked at involve where there's  
15           actually been a trial, there's been evidence  
16           presented to a court. And it wasn't the court  
17           that was the one that was accused of  
18           discrimination.

19           And in contracting, for example, there  
20           is a history of discrimination in contracting, but  
21           it's also the case that the government's  
22           constantly giving new contracts, and there's an

1 opportunity to compete for those new contracts.

2 The peculiar problem in broadcasting is  
3 that the initial licenses given out way -- you  
4 know, in the '30s and so forth, for free, and you  
5 know, there weren't women and minorities that got  
6 those licenses. And then basically the people  
7 that had AM licenses -- well, first of all, they  
8 never lost their licenses, and then they were able  
9 to parlay them and to get an FM station, and then  
10 to get a TV station.

11 And so the consequences of the very  
12 early discrimination carried forward all the time.  
13 And there's very few opportunities, because of the  
14 licensing process itself -- in fact, you have to  
15 have a license -- for minorities and women to  
16 break into that process.

17 And they make them -- you know, they've  
18 been economically successful, and they can use  
19 that money to continue to be successful.

20 So I don't -- so it's sort of hard to  
21 really compare.

22 And then you have the other problem is

1       that -- I think the Commission actually made a  
2       great start in these studies that were released in  
3       2000, but someone really has to do the really hard  
4       analysis of "Is this enough?" And, if not, what  
5       else do we need to look at?

6               I mean, I know of some, you know,  
7       anecdotes and some other examples. I mean, like,  
8       for example, the Commission found when they  
9       reduced the requirements for broadcast -- the  
10      financial requirements, they found that the  
11      financial requirements that they had had a  
12      discriminatory impact.

13             So, I think there is more that could be  
14      developed. But someone really just has to do that  
15      hard work. And I think it has to be the  
16      Commission, because the Commission's the one  
17      that's going to be defending it in court.

18             But it's an awkward position for the  
19      Commission, because the Commission is the one that  
20      has -- you know, has to admit that either they  
21      actively or passively discriminated.

22             So it's just a tough thing. But, again,



1 I think the Commission needs to do that hard  
2 analysis.

3 MR. LEWIS: I guess I'd have one  
4 follow-up question on the active-passive  
5 distinction. Because I know that there's a theme  
6 in the Court now that you have to show that we're  
7 remedying discrimination by the government entity.  
8 And if all that we could show is that the  
9 Commission passed through discrimination by  
10 others, is that enough? And do we -- further,  
11 would we have to show, even in a passive sense,  
12 that we were on notice--that there was actual  
13 discrimination going on?

14 I think Professor Hammond's example of  
15 failure to act in the face of hard evidence of  
16 discrimination is a good one. But that's only one  
17 example.

18 And the global issues of discrimination  
19 in financing, capital markets discrimination, or  
20 advertising discrimination -- it's unclear to me  
21 yet what, how much the Commission was put on  
22 notice that there was active discrimination going

1 on there, other than just they get an applicant,  
2 the applicant -- they mechanically evaluate the  
3 applicant's qualifications, and they approve the  
4 license or not.

5 Any thoughts?

6 MS. CAMPBELL: Well, I think there are  
7 other examples. I mean, the Commission -- many of  
8 the entities that received licenses were  
9 segregated schools, and segregated state  
10 governments and that sort of thing.

11 But I guess the question -- the harder  
12 question for me is how much of that do you really  
13 need to show? And also, I think, showing intent.  
14 When you're looking at, you know, an agency that's  
15 evolved and changed over so many years, and so  
16 many different people, it's just hard to even  
17 figure out, you know -- even if you've said, even  
18 if you found evidence that a Commissioner didn't  
19 -- you know, was a racist, you know, so what?

20 I mean, that's what's hard about it.  
21 Well, I'll stop there. Other people may know more  
22 about it.

1 MR. BAYNES: I don't know if you have to  
2 show -- you know, for these purposes, I don't  
3 think you have to have conclusive evidence of, you  
4 know, a finding, a formal finding by a court of  
5 discrimination or intent. I mean, I don't read  
6 the cases as showing that you need intent.

7 I mean, you need to have a substantial  
8 basis of evidence that there was some sort of  
9 discrimination.

10 And, in terms of, you know, whether you  
11 have to have notice, I mean I think that's sort of  
12 an open question. But clearly there have been a  
13 lot of other hearings that the FCC has had where  
14 broadcasters -- minority broadcasters, women  
15 broadcasters -- have testified and notified the  
16 Commission that there were capital market  
17 discrimination, or other-advertising  
18 discrimination.

19 I mean, I think this -- you know, this  
20 has been -- the Commission has been on notice of  
21 some of these things for a number of years and,  
22 you know, just really took some action now with

1 the advertising discrimination. You know, it  
2 hasn't really taken action on some of the other  
3 things.

4 So I think you probably could find  
5 evidence of notice if you look for it.

6 MR. HAMMOND: I think -- I'll just add  
7 -- I'd probably be one of the oldest people here.

8 If you go back even to the Van Deerlin  
9 hearings back in the '70s, you'll find extensive  
10 hearings on advertising, and the impact of  
11 advertising decisions on minority efforts to have  
12 viable stations.

13 So I second everything that Len and  
14 Carolyn -- Angela, rather, have said with regard  
15 to this issue. But I think that there is evidence  
16 that the Commission could go back and fill in  
17 with. And they did have notice.

18 MS. REED-HUFF: To the extent that  
19 notice might be required at all, I mean, there are  
20 different types of notice, as well. There's  
21 actual notice, where you actually know that  
22 there's been discrimination based on evaluation of

1 the Commission's past practices.

2 But to follow up on what Professor  
3 Baynes was saying, the Commission very well could  
4 be found to have been on inquiry notice, imposing  
5 the duty to ask further questions. And because  
6 there have been so many hearings over the years,  
7 and there have been so many allegations of  
8 discrimination in a variety of areas relating to  
9 broadcasting, I think there could logically be  
10 reached a conclusion that there was at least  
11 inquiry notice which might, in fact, satisfy any  
12 notice requirement if there is any.

13 MR. LEWIS: Dr. Byerly?

14 MS. BYERLY:: : I'm concerned that no  
15 one's talking about conglomeration. Maybe I'm a  
16 lone voice here.

17 I think we've got -- and I don't know  
18 where this fits into the passive-active, except I  
19 think it's probably a passive issue.

20 In allowing conglomeration to continue,  
21 and allowing the richer -- I think the Syracuse  
22 case that LaVonda brought up is really excellent.

1 I lived in that market area and I know the  
2 stations you're talking about. And I felt the  
3 loss because I've moved since that happened, and I  
4 was sorry to hear that.

5 I think that -- and it's happened with  
6 women's stations particularly. I mean, one of the  
7 things we did when we got such low response rate  
8 to our survey among women owners is we called  
9 about 180 stations to see what the- status was of  
10 ownership.

11 And we found that from the time that the  
12 ownership reports had been posted and the time  
13 that we called, many of them had sold out. And  
14 they had sold out to Clear Channel and a lot of  
15 the other big places.

16 And I think as long as this process is  
17 allowed to continue, that you're going to have  
18 fewer and fewer people owning the stations. And  
19 they're not serving diverse communities.

20 And I think whether you call it "active"  
21 or "passive" involvement, I think that this is --  
22 the conglomeration issue is something that seems

1 to be a taboo. We can't talk about it. And I've  
2 actually heard people from the inside of the  
3 government in the policy-making process say it's  
4 not likely to happen. Nobody's likely to touch  
5 it.

6 And I want to know why. I want to know  
7 why. And I want to know why we can't have studies  
8 that really show the impact of it, and its  
9 detrimental impact across communities.

10 The demographics of this country are  
11 changing very rapidly. And this process is not  
12 serving the public interest.

13 So I would just put the conglomeration  
14 issue on the table and see what we can do about  
15 it.

16 MR. LEWIS: Do the other panelists agree  
17 that the Commission's -- at least in the past  
18 decade or so -- rules that have allowed further  
19 consolidation have had an adverse impact on  
20 minority ownership?

21 MR. HAMMOND: I think it has. We're  
22 updating a study now that we did for the

1 Commission on the impact of the failed station  
2 solicitation rule and its impact on -- actually,  
3 not the failed station solicitation rule so much  
4 as the local market agreements, the tacit allowing  
5 of the local market agreements to continue, and  
6 what that did to, potentially to, minority-owned  
7 stations and female-owned stations in a number of  
8 markets.

9 I know, Angela and I -- the first time I  
10 met Angela was when we were working on the  
11 Commission's decision to expand the number of  
12 radio stations an entity could own back in the  
13 '80s. And we were saying back then -- and the  
14 National Association of Black-Owned Broadcasters  
15 and others were saying back then -- "You're going  
16 to make it more difficult for us to actually  
17 compete."

18 They've been saying that for years. And  
19 the Commission knows that. The Commission has not  
20 done -- and this is "the Commission" broadly  
21 stated, obviously. It changes over time. The  
22 Commission has not done the work to determine what



1 the impact of those types of policies are. In  
2 fact, the Prometheus case was about the fact that  
3 the FCC had not done that work.

4 So it seems to me clear that the FCC is  
5 on notice that there is at least an issue that it  
6 ought to be paying attention to, and that there is  
7 a need for more data and more analysis and  
8 investigation as to how its policies in one area  
9 affect its policies in another area. And it  
10 doesn't make those connections sometimes.

11 MR. LEWIS: Now, you mentioned LMA's.  
12 Could you just expand upon that for a second about  
13 why -- the dynamic you think that's at play there?

14 MR. HAMMOND: Well, basically, what the  
15 LMAs allowed some entities in markets to do is  
16 expand the number of stations that they could  
17 actually control in the market. They did it by  
18 contract as opposed to by ownership.

19 But by virtue of those agreements, they  
20 were able to have greater impact on advertising in  
21 terms of who was approached to place ads with.  
22 And it had an impact on programming, because it